85-1667

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

Donald Rhode, Petitioner

vs.

San Jacinto County, Texas

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Fifth Circuit err in holding that, where an elected county constable responsible only to the voters has personally made decisions and engaged in unlawful conduct related to his specific duties of office, such decisions and conduct cannot and do not constitute official county policy, custom, practice or procedure for which the county is liable under 42 U.S.C. §1983 and Monell v. New York City Department of Social Services, 436 U.S. 658 (1978)?

Parties

Donald Rhode; Petitioner

San Jacinto County, Texas; Respondent

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause, sub nom in the matter of: Donald L. Rhode v. Rathell Denson and San Jacinto, County, Texas entered on November 5, 1985.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit for which review is sought is reported at 776 F.2d 107 (1985) and is reproduced at Appendix B, infra, page 1b.

The final judgment of the United States District Court for the Southern District of Texas is unreported and is reproduced at Appendix a, infra, page 1a.

JURISDICTION

This is an application for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Jurisdiction of the United States District Court for the Southern District of Texas wherein this case arose was based upon 42 U.S.C. §1983 and 28 U.S.C. §1343(a)(3). The Federal District Court below entered judgment for the Plaintiff, Petitioner in this Court. On November 5, 1985, the United States Court of Appeals for the Fifth Circuit entered its opinion reversing the judgment of the trial court. On December 3, 1985, Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied and filed by the United States Court of

Appeals for the Fifth Circuit. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. {1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XIV §1:

> No state shall make or enforce any law which shall abridge the privilege of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. §1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. §1343(a)(3)

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> To redress the deprivation, under color of any State law, statute, ordinance, regulation,

> custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Texas Const., Art. V §18:

> In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified;

STATEMENT OF THE CASE

This is a civil rights case arising under 42 U.S.C. §1983 and 28 U.S.C. §1343(a)(3) on account of conduct personally committed by the duly elected constable of Precinct #4 of San Jacinto County, Texas on or about December 13, 1980 in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

San Jacinto County is a rural county with less than 10,000 residents situated north of Houston in East Texas. Like all other Texas counties prior to January 1, 1984, it was required to have four justice of the peace precincts and an elected constable in each precinct. Texas

Const., Art. V, §18. The events which occurred on December 13, 1980 involved the direct and personal conduct of the duly elected constable, Rathell Denson and do not involve any issue with regard to the conduct of his subordinates.

The Petitioner, Donald Rhode, was driving west bound on Texas Highway 190 when he came upon the constable's car and passed it on the right-hand shoulder of the road to avoid a collision. Denson, who was not wearing a uniform recognizable as that of a police officer, approached Petitioner's car with what appeared to be, and was in fact, a pistol. Petitioner sped away and a chase ensued during which Constable Denson fired his pistol

several times at Petitioner's car. Eventually, Petitioner lost control of his vehicle during the chase, hit a tree and sought refuge in a nearby home hysterically explaining to its occupants that someone, who was in fact a constable, was trying to kill him. Inside the home, Petitioner and its occupants called the Walker County Sheriff's Department. After numerous law enforcement vehicles arrived from both San Jacinto and Walker County, Texas the Petitioner was arrested for evading arrest and passing on the wrong side of the road. Because of his apparent fright, the residents of the home asked that he be taken to San Jacinto County by a deputy sheriff rather than the constable. This

request was honored but once across the San Jacinto County line, the Petitioner was placed in Constable Denson's car. Thereafter, Constable Denson took Petitioner to the county jail. During his trip from the San Jacinto County line to the jail, Petitioner was threatened by the constable. At the jail, he was confined without medical attention and left to wash blood from his face with water in a toilet. Some hours later, at approximately 5:00 a.m., his wife obtained his release.

Petitioner sued Denson and San Jacinto County under 42 U.S.C. §1983 and 28 U.S.C. §1343. The jury found that Denson, under color of state law and in bad faith, deprived the Petitioner of his constitutional rights

during his apprehension, arrest and subsequent detention. The jury found San Jacinto County and Constable Denson jointly and severally liable for actual damages in the amount of $150,000.00 and further found that the Constable's acts were committed "intentionally, maliciously, recklessly or in callous disregard of the civil rights of Donald Rhode" and awarded punitive damages in the amount of $3,000.00 against the constable individually.

Constable Denson did not appeal the jury's verdict and judgment of the Court. San Jacinto duly perfected its appeal. On November 5, 1985, the United States Court of Appeals for the Fifth Circuit before Judges Goldberg,

Jolly and Higginbotham, reversed the judgment of the District Court, Judge Goldberg dissenting.

In its opinion, the majority held that "we are unpersuaded that a constable of a Texas county precinct occupies a relationship to the county such that his edicts or acts may fairly be said to represent official county policy." 776 F.2d 107 (5th Cir. 1985). In reaching his conclusion, the majority concluded that,

> "the critical circumstance is that Denson, as a constable of a precinct, was not given that discretion, or range of choice, that is at the core of the power to impose one's own chosen policy. It is true that a constable possesses a limited range of choice, which is essential even to virtually ministerial tasks. But a constable's range of choice is no greater than that, for

> example, of a peace officer and must decide whether to arrest for a misdemeanor committed in his present." 776 F.2d 107 (5th Cir. 1985).

In substance, the majority opinion establishes a rule which insulates a county, qua county, from any responsibility or liability for the acts of an elected official even though that official's personal conduct in discharging the particular duties of his office is wholly unsupervised and uncontrolled by any other body, group or individual within county government.

The dissenting opinion of Judge Goldberg stressed the fact that while a constable does not occupy a position,

> "as lofty as that of a county judge or district attorney, he nonetheless, by virtue of his

elected position, 'holds virtually absolute sway over the tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein.'" Citing the opinions of the Court of Appeals in Crane v. State of Texas, 759 F.2d 412 (5th Cir. 1985) and Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980).

Judge Goldberg's sharp dissent further emphasized the undisputed fact that,

> "the county constable is the top dog in the areas of responsibility granted to him by virtue of his office. The buck stops with him. When Rathell Denson decided that, in the exercise of his unsupervised and otherwise lawful power to arrest Rhode, (he needed to shoot at Rhodes car and place him in a cell without medical attention where Rhode was forced to wash his wounds with toilet water), he exercised his 'final authority in a matter involving the...means of achieving goals.' As such, 'his choices represent governmental

policy.'" Citing Crane v. State of Texas, 759 F.2d at 430, quoting Bowen v. Watkins, 669 F.2d 979 at 989 (5th Cir. 1982).

REASONS FOR GRANTING THE WRIT

In this case, the United States Court of Appeals for the fifth Circuit in a sharply divided opinion has effectively overruled its earlier decisions in Crane v. State of Texas, 759 F.2d 412 (5th Cir. 1985); Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. 1981)(en banc), cert. den'd 105 S.Ct. 3476 (1985); Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982).

Further, the holding the Court of Appeals in this case has carved out an astonishing exception to the rule announced by this Court in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). For the first time, a Court of Appeals has held

that the discretionary decisions and conduct of an elected official concerning discharge of his official duties and responsible only to the voters of the governmental unit in question cannot be a policy-making official for purposes of 42 U.S.C. §1983.

The majority opinion of the Court of Appeals has created a virtually inexplicable exception to the rule that units of local government are responsible for the policies formulated by their elected officials. It creates a novel concept that rejects the well established rules for analyzing whether or not a particular official is a "policy-maker" for the governmental entity. The traditional approach has

focused on the nature of the official's conduct; whether such conduct or decisions are subject to review by some other individual or group within the unit of government and whether the injuries inflicted are directly related to the official's exercise of unsupervised discretionary power.

Review by this Court is necessary to correct a decision which is plainly wrong and contrary to well established precedent which holds that a unit of local government is responsible for the conduct and decisions of its elected official who exercise ultimate authority for the conduct of the particular aspects of their office if such conduct and decisions infringe upon the rights of

any person in violation of the Constitution and laws of the United States. It is contrary to this Court's opinion in Monell v. New York City Department of Social Services, supra, and its progeny which recognize that units of government ultimately establish policy, customs, practice, procedures ad usages through elected officials responsible to the voters and to no one else.

Question Presented

> Did the United States Court of Appeals for the Fifth Circuit err in holding that, where an elected county constable responsible only to the voters has personally made decisions and engaged in unlawful conduct related to his specific duties of office, such decisions and conduct cannot and do not constitute official county policy, custom, practice or procedure for which the county

is liable under 42 U.S.C. §1983 and Monell v. New York City Department of Social Services, 436 U.S. 658 (1978)?

In Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), this Court held that a unit of local government was responsible for acts committed pursuant to official policy, custom, practice, procedure and usage abridging the constitutional rights of citizens. Further, Monell recognizes that such policy can be of an informal nature and based upon the conduct of those individuals within the unit of local government who exercise ultimate authority for government affairs.

Since the landmark decision in Monell, numerous courts have addressed

the issue of how and when the conduct and decisions of local officials is of such a quality and nature as to constitute policy for the particular unit of government.

In Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984)(en banc) cert. den'd, ___ U.S. ___, 105 S.Ct. 3476 (1985), the 5th Circuit Court of Appeals addressed the issue of what constitutes policy-making authority with the observation that policy-makers,

> "...not only govern conduct; they decide the goals for a particular...function and devise the means of achieving those goals. Policy-makers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance." 728 F.2d at 769.

The facts of the case sub judice compel the conclusion that the constable was a policy-maker for the county. First, the constable in question was not supervised by any person, board, body or entity of county government. He was and is responsible only to the voters for supervision "as to the totality" of his performance. In this regard, the constable bears no resemblance to a rank and file uniformed city policeman whose performance is systematically reviewed by the chain of command for compliance with policies established by a city council and a chief of police. In the case sub judice, the constable is, in effect, the "city council" and the

"police chief" combined in a single person. No on supervises the constable except the voters.

Secondly, the constable in this case had the exclusive ability not only to control his own conduct but to decide the goals for the particular county function over which he exercised total authority, i.e. law enforcement, and had the exclusive power to devise the means by which he would achieve those law enforcement goals. Thus, Constable Denson alone had the power to determine who, when, where and how to affect arrests. It is conceded and undisputed that no other county official, not the sheriff, the county commissioner, the county judge, the county treasurer, county surveyor or

other body, could fix and establish policy concerning manner and means by which each elected constable discharged the duties of his office.

To conclude that the elected constable was not a policy-maker within his sphere of office defies common sense, He is, in effect, a one-man police force who effectively implements the same kind of policy decisions with regard to the conduct of his duties as would be made by the chief of a police department who had been delegated full authority for the operations of the department by a city council.

If the unlawful conduct involved in the case sub judice had been personally committed by the elected Sheriff of San Jacinto County

there would be no dispute or argument that such decisions and conduct would amount to policy for the county. Because the constable within his sphere of office has the same, unsupervised latitude as the sheriff, the constable's decisions and policies with regard to the manner and means by which he conducts his office also should be policy of the county.

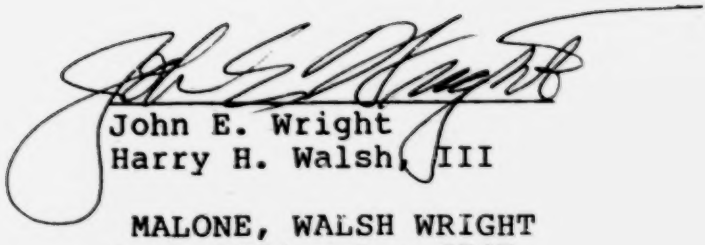
In City of Oklahoma City v. Tuttle, ___ U.S. ___, 105 S.Ct. 2427 (1985) this Court said that "...the word 'policy' generally implies a course of action consciously chosen from among various alternatives." 105 S.Ct. 2436. Further, in footnote 6, the Court said that "one will known dictionary for example, defines

'policy' as 'a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.'" 105 S.Ct. 2436. Evidence at the trial in this case disclosed that the constable committed similar conduct in an unrelated incident occurring a year or so after the Rhode affair. That later episode led to Denson's criminal conviction for aggravated assault. Thus, the record reflects a policy, albeit informal, which condoned or permitted the unreasonable and unnecessary use of deadly force. It seems reasonably certain that if a municipal police department had adopted a policy which authorized the

unreasonable or unnecessary use of deadly force, injuries occurring as a result of that policiy, would be attributable to the city. By contrast, the constable is not required to follow some other governing body's guidelines, such as those that a city council or police department might establish on the use of deadly force; instead, the constable alone makes those policy choices for himself in the absence of any other supervision. Those selections or choices as to particular course or methods of action clearly constitute "policy" as this Court has defined it. Since the constable is the one who defines that "policy" he must a fortiori be a "policy maker."

This Court should review this

case because the decision of the United States Court of Appeals for the Fifth Circuit is contrary to its own precedent and to the holdings of this Court in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). The decision of the Court below effectively means that an elected official can commit the most outrageous and egregious violations of the Constitution and laws of the United States by virtue of his county office and yet county government can totally escape responsibility for such conduct. For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.



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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DONALD RHODE	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	H-81-2324-CA
RATHELL DENSON	*	
AND SAN JACINTO	*	
COUNTY, TEXAS	*	

FINAL JUDGMENT

This action came on for trial before the Court and a jury, Honorable Robert O'Conor, District Judge Presiding, and the issues having been duly tried and the jury having duly rendered its answer to interrogatories as follows:

"1. Do you find from a preponderance of the evidence that Rathell Denson committed an act or acts under color of state law that deprived Donald Rhode of a civil right guaranteed by the Constitution and laws of the United States?

Answer: "Yes" or "No."

Answer: Yes.

2. Do you find from a preponderance of the evidence that Rathell Denson reasonably believed that he was acting under the authority of the laws of the State of

Texas, and that he had the lawful authority to arrest and apprehend Donald Rhode and to prevent Mr. Rhode's escape and acted in good faith on the basis of this belief?

Answer "Yes" or "No."

Answer: No.

3. If you answered Interrogatory No. 1 "Yes" and Interrogatory No. 2 "No" and only in that event, then answer the following:

Do you find from a preponderance of the evidence that such act or acts were a proximate cause of any damages to Donald Rhode?

Answer "Yes" or "No."

Answer: Yes.

4. Do you find from a preponderance of the evidence that San Jacinto County committed an act or acts under color of state law that deprived Donald Rhode of a civil right guaranteed by the Constitution and laws of the United States?

Answer "Yes" or "No."

Answer: Yes.

5. If you have answered Interrogatory No. 4 "Yes" and only in that event, then answer the following:

Do you find from a preponderance of the evidence that such act or acts were a proximate cause of any damages to

Donald Rhode?

Answer "Yes" or "No."

Answer: Yes.

6. If you answered Interrogatory Nos. 1, 3 and/or 4 & 5 "Yes" and only in that event, then state the amount of damages, if any, that would fairly and reasonably compensate Donald Rhode for injuries sustained by him.

Answer in dollars and cents.

Answer: $150,000.00

7. If you answered "Yes" to Interrogatory No. 1 and No. 3 and "No" to Interrogatory No. 2 and you find from a preponderance of the evidence that the act or acts were committed intentionally, maliciously, recklessly, or in callous disregard of the civil rights of Donald Rhode then state the amount of damages, if any, you find will punish Rathell Denson and serve as a deterrent to prevent others from engaging in similar act or acts.

Answer in dollars and cents, if any.

Answer: $3,000.00.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the Plaintiff, Donald Rhode, shall have and recover of the Defendants San Jacinto County, Texas and Rathell Denson, jointly and

severally, the sum of $150,000.00 with interest thereon at the rate of 11.9% as provided by law, and that the Plaintiff further have and recover of the Defendant Rathell Denson the sum of $3,000.00 in punitive damages, with interest thereon at the rate of 11.9% as provided by law, and, further, that the Plaintiff Donald Rhode have and recover of Defendants Rathell Denson and San Jacinto County, Texas, jointly and severally, his costs of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Donald Rhode is allowed all writs and processes provided by law for the enforcement of this judgment.

DATED at Houston, Texas, this the 19th day of September, 1984.

APPROVED:

/s/Robert D. O'Conor, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2586

DONALD RHODE, Plaintiff-Appellee

v.

RATHELL DENSON and SAN JACINTO, COUNTY, TEXAS, Defendants

SAN JACINTO COUNTY, Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas

---

(November 5, 1985)

Before GOLDBERG, JOLLY and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

We face again the troublesome issue of whether an episodic but tortious and unconstitutional act of an elected county official is chargeable to the county as its policy under Monell v. New York

BEST AVAIL

City Department of Social Services, 436 U.S. 658 (1978). Persuaded that the unconstitutional acts of Rathell Denson, an elected constable of Precinct 4 of San Jacinto County, Texas, did not reflect county policy, we reverse the judgment for money damages entered against the county upon a jury verdict.

I.

San Jacinto County, a rural county with fewer than 10,000 residents, is located north of Houston in East Texas. Like every Texas county before January 1, 1984, it was required to have four justice of the peace precincts and an elected constable in each precinct. TEX. CONST. art 5, §18. In 1978, Rathell Denson was elected constable of its Precinct 4. The events behind this suit occurred the night of December 13, 1980. Our description adopts the version of the facts favorable to the jury verdict.

ABLE COPY

Donald Rhode was driving westbound on highway 190 when he came upon Denson's car and passed it on the right-hand shoulder of the road. When Denson gave chase, Rhode stopped. Not knowing that Denson was a constable, Rhode sped away when Denson approached with what appeared to be a gun. Denson resumed the chase, firing his gun several times at Rhode's car. When Rhode's car left the road and hit a tree, he ran to a nearby house hysterically explaining that someone was trying to kill him. The startled residents, the Gladdens, called the county sheriff's department. When a deputy sheriff arrived, Rhode was arrested for evading arrest and passing on the wrong side of the road. In view of Rhode's frightened condition, Mr. Gladden asked that Rhode be taken to San Jacinto County by the deputy rather than by Constable Denson. The deputy complied, but once inside the county line,

Rhode was transferred to Denson's car. Threatening him along the way, Denson drove Rhode to the county jail, placed him in a cell without medical attention, and left him to wash the blood from his face with water from the toilet. Some hours later, at about 5:00 a.m., his former wife obtained his release.

Rhode sued Denson and San Jacinto County under 42 U.S.C. §1983 (West 1981) and 28 U.S.C. §1343 (West 1976 & Supp. 1985). The jury found that Denson, under color of state law and in bad faith, deprived Rhode of his constitutional rights while apprehending and arresting him. Rhode suffered $150,000 in damages for which San Jacinto County and Denson were held jointly and severally liable. The jury also found that Denson's acts were committed "intentionally, maliciously, recklessly or in callous disregard of the civil rights of Donald Rhode" and

awarded punitive damages of $3,000 against Denson individually. Only San Jacinto County appeals.

II

The district court instructed the jury that the County could be liable if it had the duty to train and supervise Denson but failed to do so. The court's charge thus allowed the jury to conclude that failure to train would support county liability without evidence of gross negligence. Rhode concedes that the charge was in error, given City of Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985), but argues that he is nonetheless entitled to judgment on the jury verdict because the County is liable as a matter of law. His argument has two distinct strands. First, he asserts that a Texas constable is a policy-making official of a county. Second, he asserts that every decision of such official made within the general ambit of his

authority is an expression of policy.

Rhode's second assertion is an attempt to escape application of the rule that protects counties from vicarious liability. Monell, 436 U.S. at 691. He argues that because a constable is a policymaking official, his every tortious act committed within the general ambit of his authority is a policy decision, which exposes the County to direct liability. Of course, in a finite sense every decision by a policymaker is one "promulgated by the...lawmaking officers, or by an official to whom lawmakers have delegated policy-making authority." Bennett v. City of Slidell, 735 F.2d 861, 862 (1984)(en banc), cert. denied, 105 S.Ct. 3476 (1985). At the same time, imposing liability upon a county for an episodic tort by such officials is functionally indistinguishable from the imposition of vicarious liability. Nor does a discrete tort express policy

in the sense that it sets a course or connects discrete dots to form a discernible line. Whatever the merit of the argument that every act of a policymaking official is policy, we do not reach it. We are unpersuaded that a constable of a Texas county precinct occupies a relationship to the County such that his edicts or acts may fairly be said to represent official county policy.

Rhode argues that the office of constable is analogous to that of county sheriff or county treasurer, whose holders obtain "policymaking authority by virtue of the office" to which they are elected. Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (en banc) (denying reh'g (with opinion)), cert. denied, 105 S.Ct. 3476 (1985). The County denies that a constable holds such a position and points out that although the commissioners' court disburses his salary,

the commissioners' court and the county judge have no supervisory authority or other direct superintendence over the constable's training, qualifications, or the manner in which he performs his constable duties.

We have defined official policy to be:

> A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority;

Id; see also, Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984)(en banc).

In Familias Unidas v. Briscoe, we considered the liability of a Texas county for the acts of a county judge:

> Because of the unique structure of county government in Texas, the judge--like other elected county officials, such as the sheriff and treasurer--holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is

> accountable to no one other than the voters for his conduct therein. Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

619 F.2d 391, 404 (5th Cir. 1980) (emphasis added) (citations omitted).

Not every elected county official holds full sway over the tasks entrusted to him. Moreover, whether an official has the power to make policy cannot always be answered by the official's apparent place in a hierarchical scheme. In the present context, for example, the county commissioners and county judges are the primary governing officials of a county. Unlike a county judge, the constable's constituency was not county wide. Denson was elected by the voters of a precinct as one of four such officials in the County. Yet while

Denson was constable for county precinct number four, not the entire County, he could serve process and make arrests and otherwise carry out the duties of a peace officer throughout the County. While a constable must obtain the funding for his office from the commissioner's court, only judges of a state district court, with districts that may include several counties, may remove him from office. TEX. CONST. art. 5 §24.

The determining factor, however, is neither that a constable is elected by voters from a subunit of the County nor that the commissioner's court controls his salary. The critical circumstance is that Denson, as a constable of a precinct, was not given that discretion, or range of choice, tht is at the core of the power to impose one's own chosen policy. It is true that a constable possesses a limited range of choice, which is essential even to virtually ministerial tasks. But a constable's

range of choice is no greater than that, for example, of a peace officer who must decide whether to arrest for a misdemeanor committed in his presence. The constable's duties, which include making arrests and serving warrants and process, see Tex. Rev. Civ. Stat. Ann. art. 6885 (Vernon 1960); Tex. Code Crim. Proc. Ann., art. 2.12, 2.13 (Vernon 1977 & Supp. 1985); Lawyers Civil Process, Inc. v. State, 690 S.W.2d 939, 941-942 (Tex. App. -- Dallas 1985, no writ), are to be contrasted with those of the county judge, sheriff or county treasurer, see Familias Unidas, supra. Their power to make and enforce policy, unlike the constable's narrowly circumscribed duties, is marked by authority to define objectives and choose the means of achieving them. See Bennett v. City of Slidell, 728 F.2d 762, 796 (5h Cir. 1984) (en banc), cert. denied, 105 S.Ct. 3476

(1935).

Rhode points to the seeming independence of a Texas constable and to the lack of superintendence by the county court. But a person who lacks the power to make policy does not become a policymaker simply because he answers to voters rather than to another official. Direct election of school janitors or toll takers or surveyors answerable only on recall would not make them policymakers. As we explained in Bennett v. City of Slidell:

> Policymaking authority is more than discretion, and it is far more than the final say-so, as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards. City policymakers not only govern conduct; they decide the goals for a particular city function and devise the means of achieving those goals. Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance.

728 F.2d at 769.[1]/

San Jacinto County points out it does not have the right to create and supervise its own police force. The Texas Constitution instead provides that the voters of a county shall elect a sheriff "whose duties andprerequisite and fees of office shall be prescribed by the legislature. TEX. CONST. art. 5, §23, and provides for the election of a constable in each precinct of a county, id. §18. The County argues that Denson was enforcing state law when he arrested Rhode and that the acts of a state-created official discharging state duties ought not be chargeable to the county.

1/The dissent argues that every elected official who does not answer directly to another official is ipso facto a "policy-maker" whose every act "in his official capacity" should be attributed to the county. We disagree, for the reasons set out in this quotation from Bennett.

In Familias Unidas, 619 F.2d at 404, we held that because the county judge's actions were confined to implementing a state statute, in contract to "his traditional role in the administration of county government or to the discretionary powers delegated to him by state statute in aid of that role," the county judge was effectuating state not county policy. Under Familias, Denson, as an official at least subordinate to the county judge in the power to effectuate county policy and discharging state duties, a fortiori could not alone make policy for San Jacinto County. We expressly affirmed Familias in Bennett v. City of Slidell, 728 F.2d 762 (1984)(en banc) cert. denied, 105 S.Ct. 3476 (1985). But Familias is not the last word. In Crane v. State of Texas, 759 F.2d 412, vacated in part on other grounds, 776 F.2d 193 (5th Cor. 1985), we held that a district attorney

discharging state law nonetheless effectuated county policy. We need not reconcile these holdings today. Whether or not a county official discharging a duty imposed by state law can ever be considered a county policymaker, we hold that Denson, as a constable, lacked the power to make county policy. REVERSED.

GOLDBERG, Circuit Judge, dissenting:

With his usual accuracy and clarity, Judge Higginbotham has set out the facts that are beyond dispute. Because I detect a corresponding absence of those qualities in the majority's exposition of the law, and because the failure to hold San Jacinto County liable for the acts of its elected official Rathell Denson runs counter to Monell, Bennett, Familias and Crane, I dissent.

Bennett v. City of Slidell tells us that there are essentially two ways in which a plaintiff can hold the county liable for the acts of its officials and employees. The first, which is not at issue in this case, is where a

> persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.

735 F.2d 861, 862 (5th Cir. 1984) (en banc) (denying re'g with opinion), cert. denied, 105 S.Ct. 3476 (1985).

While this test presents difficult line-rawing problems as to what is "so common and well-settled as to constitute a custom," the second test, which is at least here, presents far fewer line-drawing problems. In deciding whether the unconstitutional acts of Rathell Denson, an elected constable of Precinct 4 of San Jacinto County, reflect county policy, we need only determine whether his acts represent a

> decision that (was) officially adopted and promulgated by the (county's) lawmaking officers or by an official to whom the law-makers have delegated policy-making authority.

Id.

The court in Bennett was principally preoccupied with the question of how the acts of unelected officials by explicitly affirming "the writing in Familias Unidas

v. Briscoe, 619 F.2d 391 (5th Cir. 1980), as it relates to the officer who obtains policymaking authority by virtue of the office to which that officer is elected." Id. It is to Familias that I now turn.

The majority quotes the relevant language in Familias, but then proceeds to ignore it. I quote it again:

> Because of the unique structure of county government in Texas, the judge--like other elected county officials, such as the sheriff and county treasurer--holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state status and is accountable to no one other than the voters for his conduct therein. Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under section 1983.

619 F.2d 391, 404 (5th Cir. 1980) (citations omitted), quoting Monell v. Department of Social Services, 436 U.S. at 694, 98 S.Ct. at 2308.

In Crane v. State of Texas, 759 F.2d 412 (5th Cir. 1985), Judge Gee, writing for a unanimous panel, held that this language clearly covered the acts of a City District Attorney, whose

> authority to establish County procedures for issuing misdemeanor capias (which procedures were challenged as unconstitutional) derived from the County office to which he was elected by County voters. *** Because the ultimate authority for determining County capias procedures reposed in the District Attorney, an elected county official, his decisions in that regard must be considered official policy attributable to the County. As we stated in Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982),
>
> > At some level of authority, there must be an official whose acts reflect governmental policy, for the government necessarily acts through its agents. Thus the question becomes one of identifying the official who has authority to make policy; then municipal liability attaches to acts performed pursuant to that policy. When an official has final authority in a matter involving the selection of goals or of means of achieving goals, his choices represent governmental policy.
>
> 669 F.2d at 989. The County in this

> case acted through the District Attorney; he selected the means by which the County was to achieve a sound and legally sufficient capias system. His choice of an unsound and legally insufficient system represents County policy for which the County is liable.

While a constable does not occupy a position as lofty as that of a county judge or district attorney,1/ he nonetheless, by virtue of his elected position, "holds virtually absolute sway over the tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein." Familias. The

1/ The majority's reductio ad absurdum argument--"Direct election of school janitors or toll takers or surveyors answerable only on recall would not make them policymakers"--misses the mark. If the county by some political fluke chooses to elect school janitors, and those janitors are accountable to no one other than the voters, and a janitor somehow commits an unconstitutional act in his or her official capacity as a janitor, Familias and Crane require that the county be held liable. Since these positions are not filled through the ballot box, we need not yet worry ourselves about them.

majority acknowledges as much:

> (A)lthough the commissioner's court disburses his salary, the commissioners' court and the county judge have no supervisory authority or other direct superintendence over the constable's training, qualifications, or the manner in which he performs his constable duties. (supra at 4)* * *(W)hile Denson was constable for county precinct number four, not the entire County, he could serve process and make arrests and otherwise carry out the duties of a peace officer throughout the County. (O)nly judges of a state district court, with districts that may include several counties, may remove him (or a county judge) from office. TEX. CONST. art. 5 §24. (supra at 5-6).

Perhaps because they recognize the force of what they are conceding, the majority writes that the "critical circumstance is that Denson, as a constable of a precinct, was not given that discretion, or range of choice, that is at the coure of the power to impose one's own chosen policy." Supra at 6. The majority's test fails to support them here.

As the Supreme Court remarked in another context about the powers of unelected peace officers, "(p)olice officers in the ranks do not formulate policy, per se, but they are clothed with authority to exercise an almost infinite variety of discretionary powers." Foley v. Connelie, 98 S.Ct. 1067, 1071 (1978) (discretionary powers listed) (alien rights case). A fortiori, an elected constable, whose term of office, along with those of county commissioners and justices of the peace, was increased in 1954 from two to four years "in the interest of obtaining increased efficiency in the administration of county government," TEX. CONST. art. 5 §18 (quoting interpretive commentary), exercises the same "almost infinite variety of discretionary powers."

Unlike an unelected, appointed police chief who can pass the buck to the

mayor or aldermen, see Brewer v. Blackwell, 692 F.2d 387, 401 (5th Cir. 1982), the county constable is the top dog in the areas of responsibility granted to him by virtue of his office. The buck stops with him. When Rathell Denson decided that, in the exercise of his unsupervised and otherwise lawful power to arrest Rhode, he needed to shoot at Rhode's car and then place him in a cell withou medical attention (where Rhode was forced to wash his wounds with water from a toilet), he exercised his "final authority in a matter involving... means of achieving goals." As such, "his choices represent governmental policy." Crane v. State of Texas, 759 F.2d at 430, quoting Bowen v. Watkins, 669 F.2d at 989.

Once it is determined that an elected official has acted by virtue of his office in the area over which he holds virtually absolute sway, it is irrelevant that his

act was an isolated one. The act was the county's, and for the purposes of determining how to arrest someone who passes on the shoulder, Denson's decision to give chase, fire shots, and withhold medical attention was the county's decision. Id. When an elected official makes that decision, we do not require that he file away an embossed document stating that when someone passes him on the shoulder, he will give chase, fire shots, and withhold medical attention. As long as Denson was acting in his official capacity--an no one contends that he was not--his acts represent a "decision that was officially adopted and promulgated."

Bennett, 735 F.2d at 862.2/

The majority's last line of defense is that "because the (constable's) actions were confined to implementing a state statute, in contrast to his 'traditional role in the administration of county government or to the discretionary powers delegated to him by state statute in aid of that role,' the (constable) was effectuating state not county policy." This argument fails for two reasons. First, Denson was indeed exercising his traditional role and those discretionary

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2/ The majority's statement that a "discrete tort (does not) express policy in the sense that it sets a course or connects discrete dots to form a discernible line" confuses the question of whether a person is a policymaker, with the question of whether an act represents a "custom." The answer to the latter question provides a wholly distinct means of attributing liability to the county under Monell and Bennett and is not at issue here.

powers delegated to him by state statute in aid of that role.

Second, and more important, the majority indulges in the same misreading of Familias by the district court in Crane that the panel in Crane unanimously rejected. 759 F.2d at 430 n.19. As the Crane panel pointed out, the county judge's implementation of state law in Familias was not attributed to the county for two reasons, neither of which has any relevance here. First, the constitutional violation in Familias was found in the state law itself, "for which the citizens of a particular county should not bear singular responsibility." Familias at 404. As in Crane, Denson here "failed to comply with a constitutional state statutory scheme; the error was in (his) interpretation, not in the scheme." Crane, at n.19. Second, "the statute at issue in Familias Unidas was narrowly

drawn, leaving little, if any, room for the exercise of discretion in its implementation." Id. By contrast, as I have argued above, Denson was required to exercise discretion in the manner in which he placed Rhode under arrest.

At the risk of boring the reader but confident of my good intentions, I return to Crane one last time:

> Familias Unidas cannot thus properly be construed to immunize local governments from §1983 damage liability for actions within the discretion of their officials which prove to be both unconstitutional and illegal under state law. It stands rather for the unexceptionable proposition that local governments and their officials who act in conformance with a state statutory scheme will not be held liable for §1983 damages if the scheme is later held unconstitutional. Familias Unidas therefore provides no support for the (majority's) finding in this case.

Id. Denson's unconstitutional acts were by no stretch of the imagination "in

conformance with a state statutory scheme."

By virtue of his elective office, Rathell Denson was required to go about his duties as constable in a manner that comported with the federal constitution. Having elected someone who pursued his duties in an unconstitutional manner, the citizens of San Jacinto County are required by 42 U.S.C. §1983 bear the burden of their mistake. Because the majority concludes otherwise, I dissent.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2586

DONALD RHODE, Plaintiff-Appellee

vs.

RATHELL DENSON and
SAN JACINTO COUNTY, TEXAS, Defendants

SAN JACINTO COUNTY, TEXAS,
Defendant-Appellant

Appeal from the United States Dist.
Court for the Southern
District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 5, 5 Cir., 1985,
_____F.2d_____)

(December 3, 1985)

Before GOLDBERG, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/Patrick E. Higginbotham
U.S. Circuit Judge